Supreme Court, U.S.
FILED
03-977 OCT 23 2003
No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

In Re: Elliott R. Brown, Petitioner

On Petition for a Writ of Mandamus to

Wilkinson, Michael, and Traxler, Circuit Judges of

the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF MANDAMUS

Elliott R. Brown
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Petitioner, pro se

QUESTIONS PRESENTED FOR REVIEW

I. Whether it was a judicial usurpation of power, justifying the invocation of the extraordinary remedy of mandamus, where the court below, in disposition of an appeal on grounds of the doctrine of *res judicata,* did not consider applicable decisions of the Supreme Court, and therefore failed to provide a hearing that was meaningful and/or appropriate to the case.

II. Whether the court below acted beyond the scope of Federal Rules of Civil Procedure, Rule (60)(b)(4), 28 U.S.C. such that mandamus should issue to prevent it, where it applied *res judicata* to the appeal of a denial of a Rule 60(b)(4) motion.

III. Whether the court below practically nullified Rule 60(b)(4) such that the Supreme Court will not hesitate to restrain the judges that issued that nullification, where they *a priori* attributed *res judicata* effect to the judgment which a Rule 60(b)(4) motion sought relief from.

PARTIES TO PROCEEDING

The Circuit Court of Fairfax County (hereinafter referred to as the Commonwealth) was the only served defendant in proceedings in the court below, and as it does not appear on the cover, is hereby added to the list of parties.

The Petitioner is an individual and not a corporate party. The Petitioner does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of stock in the Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION IN THE SUPREME COURT 1

STATUTE INVOLVED 1

STATEMENT OF FACTS 1

ARGUMENT 2

I. The Court Below Failed To Provide Petitioner A Chance To Argue That Imposition Of *Res Judicata* Would Be Inappropriate, In Conflict With *Blonder-Tongue* 3

II. The Court Below Imposed *Res Judicata Sua Sponte* Without Having Previously Decided The Issues Presented, As Required By *Arizona III* 4

III. The Circuit Court's Application Of *Res Judicata* To Petitioner's "Motion To Reconsider" Is Prohibited By *Arizona II* 5

IV. The Circuit Court's Attribution Of Res Judicata Effect "Because We Have Already Affirmed The DistrictCourt's Disposition Of This Case" ConflictsWith *Standard Oil Of California* 7

V. The Circuit Court's Application Of *Res Judicata* To A Motion For Relief From A Void Judgment Conflicts With *Schlesinger* ..8

CONCLUSION 10

APPENDIX 11

Judgment with respect to which writ is sought 11

Opinion 12

TABLE OF AUTHORITIES

Cases **Page**

Arizona v. California, 530 U.S. 392 (2002) 4, 5
Arizona v. California, 460 U.S. 605 (1983) 6
Will v. United States, 389 U.S. 90 (1967) 2
Bell v Burson, 402 U.S. 535 (1971) 2
Blonder-Tongue Lab., Inc. v. University of Illinois Found. 402 U.S. 313 (1971) 4
Cumberland Glass Mfg. Co. v. DeWitt 7 Co. 237 U.S. 447, 458 (1915) 5
Garcia Fin. Group, Inc. v. Va. Accelerators Corp., 3 Fed.Appx. 86 (CA4 2001) 3
Goldberg v. Kelly, 397 U.S. 254 4
G. & C. Merriam Co. V. Saalfield, 241 U.S. 22 (1916) 6
*Hovey v. Elliott,*167 U.S. 409 (1897) 2
In re Burney, 998 F.2d 1 (CA4, 1992) 8
LaBuy v. Howes Leather Co., 352 U.S. 249 (1956) 3
Los Angeles Brush Corp. v. James, 272 U.S. 701 (1927) 3
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 8
Schlesinger v. Councilman , 420 U.S.738 (1974) 9
Schwartz v. U.S. 976 F.2d 213 (CA4, 1992) 8
Standard Oil Co. Of California v. United States. 429 U.S. 17 (1976) 7
U.S. v. Carmack, 329 U.S. 230 8
United States v. Winestock, 340 F.3d 200 (CA4, 2003) 6
Young-Henderson v. Spartanburg Area Mental Health Center, 945 F.2d 770 (CA4, 1991) 3

JURISDICTION OF THE SUPREME COURT

This Petition for a Writ of Mandamus is submitted under 28 U.S.C. § 1651(a). The judgment with respect to which the writ is sought (*see* p. 12) was entered on June 3, 2003. An order denying motion for reconsideration of that judgment was issued on July 20, 2003. Mandamus is therefore not available in any other court.

STATUTE INVOLVED

The statute involved in this Petition is Fed. Rules Civ.Proc.Rule 60(b)(4) which provides:

> "On motion and upon such terms as just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding [because] the judgment is void"

STATEMENT OF FACTS

"It has long been established that no independent federal jurisdictional basis is needed to support a Rule 60(b) motion proceeding. A rule 60(b) motion is considered a continuation of the original proceeding." Moore's Federal Practice 3d, §60.61

ARGUMENT

"[O]nly exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of the extraordinary remedy [of mandamus]". *Will v. United States,* 389 U.S. 90, 95 (1967). The judicial usurpation predicate is satisfied herein by reliance on *Hovey, infra*:

> "[T]he judicial department of the government is, in the nature of things, necessarily governed by the rule of due process of law." *Hovey, infra*, 167 U.S., at 418
>
> "[D]ue process of law signifies a right to be heard in one's defense." *Hovey, infra*, 167 U.S., at 417
>
> "[N]o one shall be personally bound until he has had his day in court, by which is meant until he … has been afforded an opportunity to be heard. Judgment without such … opportunity wants all the attributes of a judicial determination. It is **judicial usurpation** and oppression, and can never be upheld where justice is justly administered." *Hovey v. Elliott,* 167 U.S. 409, 418 (1897)
>
> "The hearing required by the Due Process Clause must be "meaningful" … and "appropriate to the nature of the case." … It is a proposition that hardly needs explication that a hearing that excludes consideration of an **element essential to the decision** … does not meet this standard." *Bell v. Burson,* 402 U.S. 535, 541-542 (1971)

Mr. Brown advances hereafter five distinct arguments that applicable decisions in this Court's jurisprudence were not considered in applying *res judicata* in this case. Since *res judicata* is judicial doctrine, those decisions were "element[s] essential to the decision" that *res judicata* was applicable. Therefore, in failing to consider those essential elements, the court below did not provide a hearing that was "meaningful", and/or "appropriate to the nature of the case".

Additionally, the last three arguments (§§ III through V) rely on the following authority:

> "Where the subject concerns the enforcement of the rules which by law it is the duty of this Court to formulate and put into force, mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked." *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1956)
>
> "Were it to find that the rules have been practically nullified by ... judges, [this Court] would not hesitate to restrain them" *Los Angeles Brush Corp. v. James*, 272 U.S. 701, 707 (1927)

Fed.R.Civ.P. 60(b)(4) is the rule invoked and proceeded under in the court below *de novo* (see *Garcia Fin. Group, Inc. v. Va. Accelerators Corp.*, 3 Fed.Appx. 86, 87 (CA4 2001)). Arguments III, IV and V show that the decision of the court below, "place[s the courts action] beyond the scope" of Rule 60(b)(4). Finally, argument V shows that the judgment in question "practically nullified" Rule 60(b)(4).

I. The Court Below Failed To Provide Petitioner A Chance To Argue That Imposition Of *Res Judicata* Would Be Inappropriate, In Conflict With *Blonder-Tongue*

> "It is well established in this circuit that the application of *res judicata* **requires a showing** of the following three elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) identity of parties or privies in the two suits." *Young-Henderson v. Spartanburg Area Mental Health Center*, 945 F.2d 770, 773 (CA4, 1991)

Nowhere in the record in the court below was the requisite showing made, nor did the Commonwealth raise *res judicata in any other manner.* (Nor does the

opinion (p. 12, *infra*) of the court below make the requisite *Young-Henderson* analysis upon applying *res judicata*.)

"[R]es judicata [is] an affirmative defense ordinarily **lost** if not timely raised" *Arizona III, infra.*, 530 U.S., at 410. "the purpose of such [timely raising] is to give the opposing party ... a chance to argue, if he can, why the imposition of [*res judicata*] would be inappropriate" *Blonder-Tongue Lab., Inc. v. University of Illinois Found.* 402 U.S. 313, 350 (1971)

Moreover, the decision below did not comply with the "**elementary** requirement" of a hearing that accords with due process that "the decisionmaker's conclusion ... must rest solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly,* 397 U.S. 254, 270. Since the Commonwealth did not adduce as a legal rule the doctrine of *res judicata* (and/or adduce the evidence required by *Young-Henderson, supra*), the hearing in this case in the court below was not conducted "in a meaningful manner" and, therefore, petitioner herein was not accorded "the fundamental requisite of due process of law ... the opportunity to be heard" *Goldberg, supra,* 397 U.S., at 267.

II: The Court Below Imposed *Res Judicata Sua Sponte* Without Having Previously Decided The Issues Presented, As Required By *Arizona III*

> "Finally the State parties argue that even if they earlier failed to raise the preclusion defense, this Court should raise it now *sua sponte*. Judicial initiative of this sort **might** be appropriate **in special circumstances**. Most notably, "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte* even though the defense has not been raised. This result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but it

> is also based on the avoidance of unnecessary judicial waste." *United States v. Sioux Nation,* 448 U.S. 371, 432 (1980) (RENQUIST, J., dissenting). That special circumstance is not present here: While the State parties contend that the ... dispute **could have been decided** in *Arizona I,* this Court plainly **has not previously decided the issue presented.** Therefore we do not face the prospect of redoing a matter once decided. Where no judicial resources have been spent on the resolution of a question, ... courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication."
>
> *Arizona v. California,* 530 U.S. 392, 413 (2002)

The **opinion** of the court below does **not** "notice that it has previously decided the issue presented" and, therefore, fails to consider those special circumstances under which it would be appropriate to impose *res judicata sua sponte.*

Moreover, since "[t]here is lacking in this case the first and most **essential element** of res judicata; namely, former judgment of a competent court, adjudicating the matter in controversy between the parties", *Cumberland Glass Mfg. Co. v. DeWitt 7 Co.* 237 U.S. 447, 458 (1915), the court below did not provide a hearing that was "appropriate to the nature of the case", *Bell, supra.*

III. The Circuit Court's Application Of *Res Judicata* To Petitioner's "Motion To Reconsider" Is Prohibited By *Arizona II*

On appeal before the court below was the denial of petitioner's Rule 60(b)(4) motion, which the **opinion** of the court below characterizes as a "motion for reconsideration".

> "[W]e will use the umbrella term "motions for reconsideration" to refer to post-judgment motions filed in the district court pursuant to Fed.R.Civ.P.

59(e) or **Fed.R.Civ.P. 60(b)**".*United States v. Winestock*, 340 F.3d 200, 203, n.1 (CA4, 2003)

"A direct attack on a judicial proceeding is an attempt to have it corrected, annulled, reversed, vacated or **declared void**. The Federal Rules of Civil Procedure provide several methods of attacking a judgment. ... **A litigant may also seek to have the judgment vacated under Federal Rule of Civil Procedure 60. These statutory procedures for directly attacking errors or deficiencies in a judgment are not subject to the claims preclusion doctrine**." Moore's Federal Practice 3d, §131.02[1][a]

"The doctrine of res judicata furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action. Obviously the rule of decision applies **only when the subequent action has been brought.**" *G. & C. Merriam Co. V. Saalfield*, 241 U.S. 22, 29 (1916)

"It is clear that *res judicata* and collateral estoppal do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment." *Arizona v. California*, 460 U.S. 605, 619 (1983).

Clearly, petitioner's Fed.R.Civ.P. 60(b)(4) motion is a **direct attack**, prohibited from preclusion by *Arizona II.* Also, since "[a] Rule 60(b) motion is considered a **continuation of the original proceeding**." Moore's Federal Practice 3d, §60.61, it **is not** a **subsequent action**, as required by *Merriam* for the application of *res judicata* .

Moreover, since *Arizona II* prohibits application of preclusion principles to "motions for reconsideration", such as Rule 60(b) motions (*Winestock*), the court below acted "beyond the scope", *LaBuy, supra,* of Rule 60(b)(4), and, consequently, did not provide a hearing that was "appropriate to the nature of the case", *Bell, supra.* when it applied *res judicata* to Petitioner's "Motion to Reconsider".

IV. The Circuit Court's Attribution Of Res Judicata Effect "Because We Have Already Affirmed The District Court's Disposition Of His Case" Conflicts With *Standard Oil Of California*

The **opinion** of the court below invokes the doctrine of *res judicata* to dispose of Petitioner's appeal of the denial of his Rule 60(b)(4) Motion, its sole stated rationale being that "we have already affirmed the district court's disposition of his case."

> "It has also been argued that the appellate leave requirement protects the finality of the judgment ... In our view the arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues before the court, and does not purport to deal with possible later events. ... Furthermore, the interest in finality is no more impaired in this situation than in any Rule 60(b) proceeding. *Standard Oil Co. Of California v. United States.* 429 U.S.17, 18 (1976)

"In this situation" refers to the same circumstances that the **opinion** of the court below found determinative in the case at bar: the judgment which the 60(b) motion seeks relief from is "already affirmed" by an appellate court. Since a 60(b) movant so situated has a "right to proceed in District Court" *ibid,* at 17, he has, under 28 U.S.C. 1291, a right to proceed on appeal from a final judgment denying his motion.

Since *Standard Oil* allows 60(b) movants to proceed notwithstanding a prior appellate affirmation of the judgment which relief is sought from, the court below acted "beyond the scope", *LaBuy, supra,* of Rule 60(b)(4), and, therefore, did not provide a hearing that was "appropriate to the nature of the case", *Bell, supra.,* when it gave *res judicata* effect "[b]ecause we have already affirmed the district court's disposition of his case".

V. The Circuit Court's Application Of *Res Judicata* To A Motion For Relief From A Void Judgment Conflicts With *Schlesinger*

In submitting his appeal of the denial of his Rule 60(b)(4) Motion For Relief From A Void Judgment to the court below, Mr. Brown relied on the following authority:

> "In ruling on an appeal from a denial of a Rule 60(b) motion this Court may not review the merits of the underlying order, it may **only** review the denial with respect to grounds set forth in Rule 60(b)." *In re Burney,* 998 F.2d 1, 3 (CA4, 1992)
>
> "Rule 60(b)(4) provides for relief from a judgment that is "void." A judgment is not void merely because it is erroneous. It is void **only** if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it **acted in a manner inconsistent with due process of law**." *Schwartz v. U.S.* 976 F.2d 213, 217 (CA4, 1992)

Three distinct issues were argued pursuant to the due process requirement that "adjudication be preceded by notice and opportunity to be heard appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313.

Instead of reviewing the denial of Mr. Brown's Rule 60(b)(4) motion with respect to the grounds set forth in *Schwartz*, and argued in Mr. Brown's motion, the **opinion** of the court below, *sua sponte*, gives *res judicata* effect to the subject of Mr. Brown's Rule 60(b)(4) motion, "the district court's December 13, 2001 order". The **opinion** cites no authority overruling, or even conflicting with, *Schwartz*. Nor does the **opinion** cite any authority that requires or even allows the attribution of *res judicata* effect to the judgment which a Rule 60(b)(4) motion seeks relief from. The **opinion** is therefore **arbitrary**, being "without adequate determining principle" *U.S. v. Carmack,* 329 U.S. 230, 243.

In attributing *res judicata* effect to the judgment which Mr. Brown's Rule 60(b)(4) motion seeks relief from without appropriate *Schwartz* inquiry, the court below acted "beyond the scope", *LaBuy, supra,* of Rule 60(b)(4). The court's actions also conflicted with the following authority:

> **"Only a valid judgment can be the basis for the application of the claims preclusion doctrine**. A judgment that is *void* (*i.e.*, a judicial nullity) is subject to ... attack at any time and in any proceeding. ... Federal Rules of Civil Procedure 60(b)(4) ... permit[s] a party to move the rendering court for an order vacating a judgment as void." Moore's Federal Practice 3d § 131.30[1][a]
>
> "A judgment, however, is not rendered void merely by error, nor does the granting of ... relief necessarily mean that the judgment is invalid for all purposes. On the contrary, it means only that for the purposes at hand the judgment is **without res judicata effect**: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies [validity] nor bars relief from its consequences. *Schlesinger v. Councilman* , 420 U.S.738, 747 (1974)

Because Mr. Brown's Rule 60(b)(4) argument states a *prima facie* case that the district court's December 13, 2001 judgment is void, the court below "practically nullified" Rule 60(b)(4), *Los Angeles Brush Corp., supra,* when it arbitrarily attributed *res judicata* effect to a judgment that is presumptively void; *i.e.* "without *res judicata* effect", *Schlesinger, supra*, under Rule 60(b)(4).

Finally, because the court below "practically nullified" Rule 60(b)(4), it therefore failed to provide a hearing that was "appropriate to the nature of the case", *Bell, supra.,*(and failed to do so recursively, *see Mullane, supra*).

CONCLUSION

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus issue from this Court to Wilkinson, Michael, and Traxler, Circuit Judges, of the United States Court of Appeals for the Fourth Circuit; (a) directing said circuit judges to vacate and expunge from the record the judgment of June 3, 2003 affirming the district court's order denying petitioner's motion for relief from a void judgment, and (b) further directing said judges to substitute for that vacated judgment a judgment that conforms to the standard promulgated for motions under Fed.R.Civ.P. 60(b)(4) by said court in *Schwartz v. U.S.*, 976 F.2d 213, 216 (CA4, 1992).

2. That Petitioner have such additional relief and process as may be necessary and appropriate in the premises.

APPENDIX

(Judgment With Respect To Which Writ Is Sought)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1321

Elliott Roy Brown, Plaintiff-Appellant

v.

Circuit Court of Fairfax County, et al, Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CA-01-1484-A)

Submitted: May 29, 2003 Decided: June 3, 2003

Before Wilkinson, Michael and Traxler, Circuit Judges

Affirmed by unpublished per curiam opinion

Elliott Roy Brown, Appellant, Pro Se. James Christian Stuchell, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, For Appellees.

(Opinion)

PER CURIAM:

Elliott R. Brown appeals from the district court's denial his motions to reconsider the district court's December 13, 2001 order dismissing his state law claims for declaratory relief, accounting, and restitution. We affirmed the district court's December 13, 2001 order on appeal. See Brown v. Circuit Court of Fairfax County, no. 02-1468, 2002 WL 1760769 (4th Cir. July 31, 2002) (unpublished) (per curiam). Because we have already affirmed the district court's disposition of his case, Brown's further attacks on that order are barred by principles of res judicata. Accordingly, we affirm the district court's orders. We dispense with oral argument, because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED